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IN THE

Supreme Court of the United States

No. 74-214

OCTOBER TERM, 1974

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare; United States Department of Health, Education, and Welfare; FERNANDO E. C. DEBACA, Director of Region Nine of United States Department of Health, Education, and Welfare; JOHN F. RICHARDSON, Commissioner of Region Nine of the Social Security Administration; Social Security Administration,

Appellants,

—v.—

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, *AMICUS CURIAE*

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BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, *AMICUS CURIAE*

Interest of the *Amicus*

Legal Services for the Elderly Poor is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the

Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly Poor has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court involving the elderly, including *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Allied Chemical Workers* v. *Pittsburgh Plate Glass,* 404 U.S. 107 (1971); *Ortwein* v. *Schwab,* 410 U.S. 656, *reh. den.,* 411 U.S. 922 (1973); and *Weinberger* v. *Diaz,* October Term, 1974.

All parties have consented to the filing of this *amicus* brief. Originals of the consents are annexed.

Questions Presented

In a case where the Social Security Administration wrongfully and unconstitutionally withheld entitlements from an otherwise eligible widow and daughter:

1) Can the Social Security Administration while administering a Special Trust Fund based solely on beneficiary and employer contributions refuse to pay entitlements retroactively to the date of eligibility on the basis of sovereign immunity?

2) Does the judicially created defense of Sovereign Immunity bar retroactive payments when:

a) no State-matching funds exist;

b) the contributed funds are in a Special Trust Fund and no funds would be expended from the U. S. Treasury;

c) where Congress in the Social Security Act has authorized retroactive benefits to those who have failed or neglected to file on time.

Statement of the Case

The case is stated adequately in the parties' briefs.

Summary of Argument

In granting appellees the entitlements they would have received but for the unconstitutional statutory provision, the District Court was simply "ordering the return of that which rightfully belong[ed] to [them]." *Porter* v. *Warner Holding Co.,* 327 U.S. 395, 402 (1947).

A Social Security recipient is entitled to benefits from the appropriate time of application regardless of timing and method of payment. See, *e.g., Ewing* v. *Gardner,* 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951).

Contributions in the possession of a Special Trust Fund separate from General Treasury funds and also from Treasury control are subject to execution by the District Court. *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242, 250 (1940); *Land* v. *Dollar,* 330 U.S. 731, 738 (1947).

The judicially created principle of Sovereign Immunity does not apply in a case such as this one where the Treasury and property of the United States are not affected.

The judicially created exceptions to the doctrine of sovereign immunity are clearly met in the instant case. *Dugan* v. *Rank,* 372 U.S. 609, 622-623 (1963).

This case does not involve State-matching funds nor does it concern itself with the Eleventh Amendment. The relief granted by the District Court does not place a substantial financial burden on a State Treasury nor force the reallocation of scarce welfare funds depriving persons truly in need of present benefits in order to correct past wrongful practices. *Cf., Edelman* v. *Jordan,* 94 S.Ct. 1347, 1357, n. 11 (1974).

POINT I

Sovereign immunity cannot be a defense against an award of retroactive monetary relief from the specially constituted Social Security Trust Fund.

i

General Conditions

Just as the doctrine of standing places a premium upon the selection of a proper plaintiff, the various doctrines of immunity require that attention be given to the selection of appropriate defendants. Although the judicial discussion of immunity is substantial, no general theory of immunity has emerged.[1] Consequently, immunity must be approached from the standpoint of the *particular* defendant.

[1] It was not until 1892, in *United States* v. *Lee,* 106 U.S. 196 (1882), that the Court thoroughly examined the doctrine, the reasons for it, and substantially limited its application. *Lee* qualified *earlier* holdings to the effect that where a judgment affected the property of the United States the suit was in effect against the United States, by holding that title to the Arlington, estate of the Lee family, then being used as a national cemetery, was not legally

The Fifth and Fourteenth Amendments to the Constitution created rights in individuals which may not be nullified by the government's assertion of immunity under the legal fiction of sovereign immunity.[2] The government's

vested in the United States but was being held *illegally* by army officers under an *unlawful* order of the President. In reviewing the sources and application of the rule of sovereign immunity the Court concluded that the rule "is not permitted to interfere with the judicial enforcement of the rights of plaintiff[s] when the United States is not a defendant or a necessary party to the suit." *Id.,* at 207-208.

The principle of sovereign immunity was discussed by both the majority and dissenting opinions on the subject of the rule of law:

> Under our system, the people * * * are sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. (*Majority,* Mr. Justice Miller) *Id.* at 208-209.

The rationale for sovereign immunity was stated by the dissent, Mr. Justice *Gray*:

> [I]t is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion, of custom's houses and revenue cutters, employed in the collection of revenue; or of lighthouses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country. *Id.,* at 226.

[2] In *Flemming* v. *Nestor,* 363 U.S. 603 (1960), the Court recognized with respect to Federal Social Security benefits that: "The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611.

> "The 'right' to Social Security benefits is in one sense 'earned'." *Id.,* at 610, and that "[t]he extent to which procedural due

immunity under sovereign immunity was curtailed by the creation of individual rights in the Fifth and Fourteenth Amendments.

> "Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. 'It is,' wrote Lincoln in his First Annual Message, 'as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.' 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued, though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the state.
>
> Not so long ago this Court acted on the realization that 'the present climate of opinion . . . has brought governmental immunity from suit into disfavor.' *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381 . . . ." Mr. Justice Frankfurter, dissenting *Kennecott Copper Corp.* v. *State Tax Com'n*, 327 U.S. 573, 580 (1946).

process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' • • • Accordingly • • • 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'." *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970).

The Social Security Administration is an independent agency with adequate autonomy so as not to be the mere alter ego of the government and, consequently, is unable to avail itself of sovereign immunity generally. It possesses several other traits from which it can be found that it is an independent agency.[3] The Social Security Administration has its own source of funds from which it must first pay for the needs of the eligible people. An order directing the Social Security Administration to pay its due and owing back welfare benefits will not diminish the United States Treasury.[4] In *Miguel* v. *McCarl*, 291 U.S. 442 (1934) the

[3] *Cf. Flemming* v. *Nestor, supra,* at 631-632, dissenting opinion, Mr. Justice Douglas:

> "Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. • • •. The funds are placed in the Federal Old Age and Survivors Insurance Fund, 42 U.S.C. §401(a), 42 U.S.C.A. §401(a); and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made. • • •. As the late Senator George, long Chairman of the Senate Finance Committee and one of the authors of the Social Security System, said: • • • [W]e have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity. • • •
>
> • • • • •
>
> "Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self respect. 102 Cong. Rec. 15110."

[4] *Cf., Carter* v. *Butz*, 479 F.2d 1084 (3d Cir. 1973); *Bermudez* v. *United States Department of Agriculture*, 490 F.2d 718 (D.C. Cir. 1973), holding the federal government liable for retroactive benefits in the form of forward adjustments for wrongfully withheld Food Stamp Act benefits.

> "[T]his case does not involve liability for additional expenses incurred by the federal government. This case involves bene-

Supreme Court affirmed a mandatory injunction against a federal disbursing officer requiring him to pay retroactive retirement allowances to which Miguel was entitled by law. The holding that the duty was mandatory rather than discretionary was made even though the Comptroller General had ruled to the contrary on the merits.

The funds sought to be recovered are earmarked for a special purpose in the hands of the Trustees of the Social Security Administration, and no interests of the United States Government would be affected by a decree in this suit. The fact that Congress has authorized the funds to be used for purposes of the Social Security Act does not change its character or the rights of the parties. This is not a suit against the United States. *Cf. O'Connor* v. *Rhodes,* 79 F.2d 146, 152 (D.C. Cir. 1935) *aff'd per curiam* 297 U.S. 383 (1936), citing as authority, *Philadelphia Company* v. *Stimson,* 223 U.S. 605 (1912); *Miguel* v. *McCarl,* 291 U.S. 442 (1934); *United States* v. *Lee,* 106 U.S. 196 (1882). See also, *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242 (1940).

> "[T]he result is that only those funds which have been paid over to the Trustees and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution." *Id.,* at 250.

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fits for which the federal government is responsible but which were not paid out earlier. * * * We hold that the federal government is liable for retroactive food stamp benefits." *Bermudez, Id.* at 723.

ii

Purposes and Functions of Social Security

The basic objectives of the Social Security Act are keeping individuals and families from becoming destitute due to loss of earnings, protecting older persons against the expenses of illness that would otherwise exhaust their savings, keeping families together, and giving children the opportunity to grow up in health and security. *Dalno* v. *Celebrezze,* 347 F.2d 159 (9th Cir. 1968); *Woods* v. *Gardner,* 286 F. Supp. 648 (1968); *Chernock* v. *Gardner,* 360 F.2d 257 (3rd Cir. 1966). The various programs attempt to prevent destitution and poverty rather than to relieve those conditions after they occur.

Only four programs are funded entirely by the federal government: old age, survivors, disability, and health insurance (OASDHI). These benefits are paid under a social insurance program administered by the Social Security Administration, a federal agency. Unlike the situation in *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974) no state matching funds exist.[5]

Throughout the development of the OASDHI program, certain basic principles have been adhered to:

(1) Security for the worker and his family grows out of his own work. A worker's entitlement to benefits is based on past employment, and the amount of cash benefits he and his family will get is related to his earnings in covered

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[5] *Cf. Rothstein* v. *Wyman,* 467 F.2d 226 (2d Cir. 1972) which, of course, also involved State funds at 231 (for the substantial amount of funds and administrative costs involved) and 235 (for the time problems and the question of recoupment of misspent funds).

work. In general, the more he earns the greater his protection; 42 USC §415(a);

(2) These benefits are an earned right for that family. They are paid regardless of income from savings, pensions, private insurance, or other forms of non-work income. An insured worker knows beforehand that he will not have to prove that he is needy in order to receive benefits 42 USC §402;

(3) The concept of an earned right is reinforced by the fact that workers make contributions to help finance current benefits. See *Social Security Programs in the United States,* U. S. Dept. of HEW, Social Security Administration, p. 23 and 42 USC §401(a) and (b).

The program is financed by taxes paid by employers and employees in the various fields of employment covered by the Act, the tax being on the earnings or wages of the employees. The tax rate is set by Congress in an amount intended to be sufficient over the long-range future to enable the program to pay the benefits provided when they fall due 42 USC §401(a)(1)(2)(3) and (4). Funds not needed for current benefit payments and administrative expenses are accumulated in trust funds which are invested in interest-bearing securities of the U. S. Government. 42 USC §401(d).

It must be stressed that the American system of old-age, survivors, disability and health insurance has emphasized a principle not found in some of the social insurance programs of other countries. In contrast to some programs that are financed in part by general revenues of the government, the OASDHI program is financed entirely through contributions by employees, and their employers, without subsidy from the general revenues of the government. In

fact, when Congress amended the Social Security Act in 1950, Act Aug. 28, 1950 c. 809, Title I, §109(a) 64 Stat. 521, it specifically rejected the idea of government contribution. As a result, the cost of financing the accrued liability is met solely from the payroll contributions of employers and employees.

The taxes collected are placed in trust funds: The Federal Old-Age and Survivors Insurance Trust Fund, the Health Insurance Trust Fund, and the Federal Disability Insurance Trust Fund. See 42 USC §401(a). The money in these funds not currently needed to pay benefits or administrative expenses is invested in United States government securities and obligations and draws interest, which is added to the funds. 42 USC §401(a). The tax rates plus the interest earned on the investments are intended to provide sufficient income to meet the anticipated expenditures for benefits and administrative costs into the future.

The trust funds may, therefore, be said to serve two primary purposes:

(1) They produce income from the investment in government securities and thus help defray some of the costs of the program;

(2) They constitute contingency reserves which can be used in years when expenditures exceed income.

The trust funds are managed by a board of trustees, composed of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of HEW. The Commissioner of Social Security serves as Secretary of the Board of Trustees. The Secretary of the Treasury is the managing trustee and is charged with the responsibility of investing and disbursing the funds. 42 USC §401(c).

The trust funds are kept completely *separate and apart* from other funds in the general treasury. A certain amount is kept in cash sufficient to take care of the current cash expenditures; the remainder is invested in government securities. 42 USC §401(d). This fact is stressed in several Social Security Administration publications:

> The basic idea of old-age, survivors and disability insurance is a simple one. During working years, employees, their employers and self-employed people pay social security taxes which go into *trust funds.*
>
> Then, when earnings stop because of the worker's retirement in old age, his disability, *or his death,* payments are made *from the funds* to the worker and his dependents or to his survivors.
>
> *Your Social Security Earning Record* (OASI—93, August 1964) at 5. See 42 USC §401(a) (1) (2) (3) and (4).
>
> Under the law, the money in the trust funds can be used only to pay social security benefits and the costs of administering the retirement, survivors, disability and health insurance programs. Money not immediately needed for benefit payments and administrative expenses is, by law, invested in Federal securities which earn interest for the trust funds.
>
> Contributions . . . , with interest earnings from the trust fund's investment, maintain the financial soundness of the retirement, survivors, and disability insurance and hospital insurance program.
>
> *Your Social Security Earning Record* (OASI—93, July 1966), at 21.

iii

Individual Equities and Governmental Prerogatives

When Social Security has withheld benefits, otherwise due and owing but for an unconstitutional statute, the injured party should be able to recover the true value of the benefits withheld. Such an individual should have an adequate judicial remedy against the governmental agency, notwithstanding the doctrine of Sovereign Immunity.

A special reserve fund has been created from the various Social Security taxes, out of which only social security benefits and administrative expenses may be paid. This trust fund contains 100% of the social security taxes, and only this money so collected can be used to pay social security benefits. As this Court pointed out in an analogous situation in *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242, 250 (1940):

> [T]he result is that only those funds which have been paid over to the Trustees and which are in its possession, severed from Treasury funds, and Treasury control, are subject to execution. 42 USC §401(h).

Given this system, there is no reason to protect the governmental agency from the legitimate claims of its citizens, as any restitution will be paid not from the government's general revenues, but from those funds specifically provided to meet such a contingency. As was pointed out by the majority in *Edelman, supra* a major factor distinguishing prospective relief from its retroactive counterpart is that the former at least provides a legislature with the opportunity to allocate its revenues in light of the court-ordered relief, thus facilitating both fiscal planning and adminis-

trative flexibility. In the present case, however, this rationale is inapposite, for Congress has in fact already provided a financial reserve to cover such costs. 42 USC §401(d). Thus, the administrative flexibility necessary to any program is guaranteed here by funds designed to absorb just such contingent administrative payments.

Thus, if an applicant for benefits is denied aid on the basis of an eligibility condition subsequently found to be invalid under the Secial Security Act or the Constitution, he should be able to obtain benefits retroactive to the date when he would otherwise have received aid as a matter of right, *i.e.*, the date of his application. This principle, that an applicant should be paid benefits from the time certain specified conditions actually exist and not from the time that the administrative agency finally determines that they do, finds support from several sources. In *Ewing* v. *Gardner,* 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951) per curiam, except as to taxation of costs, a fully insured wage earner did not prove that he was 65 when he filed his application for benefits under SSA though satisfactory proof was subsequently furnished by the wage earner's executor. The court found that the facts necessary under the statute to entitle the wage earner to receive monthly primary insurance benefits *actually existed,* and his right to monthly primary insurance benefits accrued, *at the time the application was filed.*

In *Ewing, supra,* the applicant did not overcome the presumptive conclusion at time of application, but the Sixth Circuit indicated that if the conditions were met, or as in the present case, a disqualifying condition deemed unconstitutional, it would follow that retroactive benefits be made.

Similarly, in *Anderson* v. *United States,* 205 F.2d 326 (9th Cir. 1953), a widow filed a proper application for an annuity under a statute granting annuities to certain civilian officials and employees who were engaged in and about construction of the Panama Canal during the construction period, or to their widows. However, the widow died shortly after *receipt* of her application was acknowledged. An action by the executor of the widow's estate against the United States for an accrued annuity was denied by the District Court on the grounds that the widow had no right *until* the claim was adjudicated by the Commission. (112 F. Supp. 524). The Court of Appeals reversed this decision, placing reliance on *Ewing* v. *Gardner, supra*:

> When does this right accrue? * * * The court below was of the view that the annuitant can have no right to the annuity until the claim is *adjudicated* (emphasis by Court) by the Commission and a certificate issued. We do not agree. When the annuitant has filed a proper application he has done all that he is required to do. The right must accrue at that time. *Cf., Ewing* v. *Gardner* * * *. at 329.
>
> * * * * *
>
> Mrs. Anderson's right to the annuity was perfected when she filed proper application for it. Inaction or denial of the claim by the Commission could not delay or defeat the right, and favorable adjudication, evidenced by the issuance of an annuity certificate, could only formally acknowledge a right already established. * * *. at 330.

The federal government itself has acknowledged, and even advocated, the same principle. In 1968, the Department of Health, Education, and Welfare (in seeking a rul-

ing) argued before the Comptroller General that federal matching funds for state public assistance programs should be made available to the states for the period between an applicant's date of filing and the state agency's eventual certification of eligibility. Two of the arguments relied on by HEW to support its position were:

> Under principles of equity an eligible individual should have his needs met from the date of his application. It is not consistent with principles of equal protection underlying State public assistance programs, if two eligible individuals with equal need for assistance apply on the same date and receive different amounts because a determination is made with respect to one in the month his application was filed but with respect to the other in the next month. The speed of the administrative process does not appear to be a reasonable basis for distinguishing between the two.
>
> In *Ewing* v. *Gardner,* 185 F.2d 781 (1950), the court held that an individual is entitled to social security benefits when he meets the statutory conditions and has filed an application for benefits. Since, his entitlement begins when the specified conditions exist and not when the administrative agency makes its determination that they, in fact, exist, payments back to the date of application are required. 48 Comp. Gen. 479, at 479 (1968).

Relying on HEW's arguments, the Comptroller General ruled that federal matching funds should be provided in the given circumstances. Comptroller General's Opinion No. A-80185, 48 Comp. Gen. 477 (January 17, 1969). Thus, the government itself has embraced the equitable principle that an applicant eventually proven eligible should receive

benefits from the time of application. (See general discussion, *infra* II, iii).

Finally, it must be stressed that this is not an area where Congress has explicitly demonstrated that the federal courts should depart from the traditions of equity. To the contrary, Congress has authorized retroactive benefits under the Social Security Act to those who have failed or neglected to file on time:

> An individual who would have been entitled to [old age or survivors insurance] benefits . . . for any month . . . and filed application therefor prior to the end of such month, shall be entitled to such benefit for such month if he filed application therefor prior to the end of the twelfth month immediately succeeding such month. 28 U.S.C. §402(j)(1).

Under this section, if an applicant becomes entitled to benefits on January 1, 1975, and is then fully insured, but does not file an application until January 1, 1976, he may be entitled to those benefits retroactively beginning with the month of January, 1975. A similar statutory provision also exists in regard to disability insurance (§423 (b)), further demonstrating the government's commitment to paying benefits from the time they actually become due.

Thus, it has been demonstrated that this is not a case where retroactive benefits should be barred by the doctrine of Sovereign Immunity. No funds from the general public coffers are at stake in this action. Further, legislative provision has been made to cover such contingent costs. Finally, all three branches of the federal government have expressed the policy that benefits should be paid when actually due, not merely when they are finally deter-

mined to be so by a given agency. In light of these considerations, retroactive benefits should be granted in the present case.

POINT II

The case law demonstrated that the defense of sovereign immunity does not apply here.

i

Leading Cases

Neither *Land* v. *Dollar,* 330 U.S. 731 (1947); *Dugan* v. *Rank,* 372 U.S. 609 (1963); nor *Hawaii* v. *Gordon,* 373 U.S. 57 (1963) bar this suit or the recovery sought. *Land* v. *Dollar, supra,* reaffirmed the rule of *United States* v. *Lee, supra,* that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[6]

In fact, in *Land* v. *Dollar, supra,* the Court suggested that if the allegations were met the interest of the Sovereign would be to allow suit and provide full relief:

> [P]ublic officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money

[6] "[I]f the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority or public offices." *Id.* at 738.

> judgment. *The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld. Id.* at 738. (Emphasis added.)

Dugan v. *Rank, supra,* involved an action by riparian and overlying owners to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River in contravention of their rights to beneficial use of the waters of the river below the dam. The United States was joined as a party defendant. The District Court (142 F. Supp. 1) granted injunctive relief. The Court of Appeals (293 F.2d 340 and 307 F.2d 96) reversed as to the United States but affirmed as to officials of the reclamation project. This Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an action against the United States; for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. It was further held that damages were recoverable in a suit under the Tucker Act (28 U.S.C. 1346).

Although the factual situation in *Dugan* v. *Rank, supra,* in no way parallels the present case, the Court's decision to apply sovereign immunity was made easier by the pleadings of the landowners and the decision of the Court of Appeals.

> [T]he fact that the Court of Appeals characterized the action of the officers as a 'trespass' does not at all establish that it was either unconstitutional or unauthorized. * * * The power to seize which was granted here had no limitation placed upon it by Congress, nor did the Court of Appeals bottom its conclusion on a finding of any limitation. *Id.*, at 622-623.

However, the Court was specific in stating the exceptions to the doctrine of sovereign immunity, not met in *Dugan,* but clearly met in the instant case:

> Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Id.*, at 621-622.

Hawaii v. *Gordon, supra,* involved an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that state. In a *per curiam* opinion the Court dismissed the suit finding that the relief requested would involve "the disposition of property admittedly belonging to the United States." *Id.*, at 58. Of course, the suit did not allege that the officer was acting pursuant to an unconstitutional statute nor exceeding his authority. While it is true that suits *may* fail if relief requires the disposition of unquestionably sovereign property or the expenditure of funds from the Treasury.[7] *Land* v. *Dollar,*

[7] *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The *Larson* case has been felt by some to give a renewed vitality to the doctrine of sovereign immunity. But the case was

supra. The property for which a disposition is presently requested was based on contributions by Londo L. Salfi during his lifetime to the Social Security Administration as trustee for his survivors.

The governmental interest is, therefore, not pecuniary since the funds will not be coming out of its general treasury and none of its property will be affected by court decree. In *Reagen* v. *Farmers Loan & Trust Co.*, 154 U.S. 362 (1894), a former owner of property in the hands of the United States obtained specific relief by demonstrating that the property was not taken for a public use. It is in-

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within two of the categories in which the doctrine has characteristically operated: enforcement of a contract and an equitable claim against government property.

Larson recognizes that a suit may be brought against an officer if the officer has acted "unconstitutionally" or "ultra vires his authority." But two qualifications in Chief Justice Vinson's opinion have caused trouble. The mere allegation that the officer, acting officially, *wrongfully* holds property to which the plaintiff has title does not meet the requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. And even more troublesome is footnote eleven:

> Of course a suit *may* fail * * * if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple,* 134 U.S. 22 (1890).

If the *may* is read as *may* and not as must, it is unobjectionable.

It has been suggested that this footnote means that a suit will fail if the relief requested would involve the disposition of government property. But the footnote does not make that statement. Rather, its meaning is that a suit must fail if it would require the sovereign to dispose of its property—sovereign action, in other words. That meaning is borne out by the one citation made. For an excellent discussion of this interpretation of footnote eleven, see *Clackamas County, Oregon* v. *McKay*, 219 F.2d 479, 492-493 (D.C. Cir. 1954).

conceivable that Congress would forbid an action to recover property taken in violation of the Fifth Amendment.[8]

Yet, this is the very substance of appellant's argument. A court of equity has the power to prevent transfer of property so that it will not be lost to its owner. *Osborn* v. *Bank of United States,* 9 Wheat. 738 (1824). As Chief Justice Marshall stated in *Fletcher* v. *Peck,* 6 Cranch 87 (1810):

> When, then, a law is in the nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling the, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired may be seized without compensation? To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection.

He continued in *Marbury* v. *Madison*:

> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation

[8] See *Anniston* v. *Davis,* 301 U.S. 337, 351 (1951) "We cannot attribute to Congress an intent to defy the Fifth Amendment * * *." *Cf. Berman* v. *Parker,* 348 U.S. 26 (1954).

> of a vested legal right . . . [w]here a specific duty is assigned by law, and *individual rights* depends upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. 5 U.S. at 69-70. (Emphasis added.)

Many cases, following *Marbury* v. *Madison,* 1 Cranch 137 (1803), have established that courts have power to compel an executive officer to perform a purely ministerial act which the Congress has directed him to perform. See discussion in *Noble* v. *Union River Logging R. Co.,* 147 U.S. 165 (1893); *Work* v. *United States ex rel. Rives,* 267 U.S. 175 (1925). That rule has been applied in a great variety of cases, including some which involved land of the United States: *Work* v. *United States ex rel. McAlester, etc., Co.,* 262 U.S. 200 (1923); *Lane* v. *Hoglund,* 244 U.S. 174 (1917); *Simmons* v. *Wagner,* 101 U.S. 260 (1880); payments out of the Treasury of the United States: *Roberts* v. *United States ex rel. Valentine,* 176 U.S. 221 (1900); *Work* v. *United States ex rel. Lynn,* 266 U.S. 161 (1924); *Miguel* v. *McCarl,* 291 U.S. 442 (1934); and other similar matters in respect to which courts have no general power.

In the absence of an explicit demonstration that Congress wishes to depart from the tradition of equity, the Court may invoke its powers in the public interest in "an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.,* 327 U.S. 395, 398 (1946). This includes the inherent power to bring in all the interested parties as well as the ability to fashion remedies.

ii

The Relief Requested Cannot Be Characterized as Damages Against the Sovereign

Appellants characterize the relief awarded below as "damages" barred by sovereign immunity, and thus seek to bring the district court's judgment within the purview of this doctrine. However, the remedy afforded below was that of restitution, which "differs greatly from the damages and penalties which may be awarded." *Porter* v. *Warner Holding Co., supra,* at 402. Appellees here do not seek relief for consequential damages caused by appellant's failure to disburse their full statutory entitlement in a timely manner. Rather, incident to the injunctive relief prayed for, they ask that exactly measured benefits retained by appellants, which would have been paid out but for a violation of the federal law and Constitution, be paid over to them.

In an injury specific and liquidated within the affected class, all individual claims are for specific liquidated amounts. *Cf. Miguel* v. *McCarl,* 291 U.S. 442 (1934); *Clackamas County, Oregon* v. *McKay,* 219 F.2d 479 (D.C. Cir. 1954). Thus, here, retroactive adjustments would not add to the already budgeted administrative expense but would disburse those monies which comprise the full measure of the statutory entitlement. *Cf. Carter* v. *Butz,* 479 F.2d 1084 (3rd Cir. 1973); *Bermudez* v. *U.S. Dept. of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973).

iii

Equitable Authority

The order by the lower court in this case that benefits, from the time of original entitlement, to plaintiffs and the class they represent, is a remedy in the form of an award of retroactive benefits is entirely consistent with the equitable authority of federal courts generally to apply all appropriate remedies. This Court's decisions in *Porter* v. *Warner Holding Co.,* 327 U.S. 395 (1947), and *Mitchell* v. *DeMario Jewelry, Inc.,* 361 U.S. 288 (1959), make clear that all of the inherent equitable powers of the federal courts are available for the proper and complete exercise of equity jurisdiction, and federal courts may give whatever relief necessary under the circumstances:

> "The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann,* 10 Pet. 497." *Porter, supra,* at 398.

The reasons for this are apparent from the nature of equity jurisdiction, which has always been to secure complete justice. 1 Pomeroy's Equity Jurisprudence §§231, 236(a); *Porter* v. *Warner Holding Co., supra,* at 398. Courts may thus, pursuant to their general equity jurisdiction,

not only order compliance with congressional acts in the future but may also compel by means of an order for restitution a return to the situation which would have existed had the congressional will not been violated. *Id.*, at 402; 4 Pomeroy's Equity Jurisprudence §1359. Without such power equity could not secure "complete rather than truncated justice." *Porter, supra,* at 398.

The purpose of the particular equitable remedy of restitution is to secure for the plaintiff that to which she or he is justly and in good conscience entitled, and to prevent the unjust enrichment of the defendant. Restatement of the Law, Restitution 1 (1937). The exercise of equitable jurisdiction by a federal court is by its very nature within that court's sound discretion. As this Court has made clear, however, where the equitable remedy of restitution will restore the injured parties to the situation they would have been in but for the statutory violation in question, and unless in opposition to the Congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement." *Mitchell, supra,* at 296.

As such it is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co., supra,* at 402.

Porter involved the power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The lower court had held that there was no authority under the statute to order restitution. This Court reversed, stating that *unless* contrary legislative intent could be demonstrated, all the inherent equitable powers of the district courts are available for the proper exercise

of equity jurisdiction. The Court specifically found the particular equitable remedy sought, restitution of back rents, a proper exercise of equitable discretion under two theories: as necessary to restore ill-gotten gains (the traditional criterion for restitution) and as necessary to advance the statutory purpose of the Emergency Price Control Act:

> "(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief . . . [w]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . .
>
> [and]
>
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.*, at 399-400 (citations omitted).

See also *United States* v. *Moore,* 340 U.S. 616 (1951).

Mitchell v. *DeMario Jewelry, Inc., supra,* made clear that *Porter* does not limit a court's authority to grant equitable restitution to situations where either express or implied congressional intent can be discerned. *Mitchell* involved a federal court's authority to order restitution of lost wages to employees discharged in violation of the Fair Labor Standards Act. This Court reiterated the principles set forth in *Porter,* and held, despite statutory language which provided that no court should have jurisdiction to "order the payment to employees of unpaid minimum wages or unpaid overtime compensation," 29 U.S.C. §217, that Congress had not intended to limit the courts' traditional equitable powers. The legislative history of §217 was employed, as in *Porter,* merely to confirm that result. *Mitchell,* at 292. Restitution of lost pay was then held to be proper in order 1) to restore the employees to the condition they would have enjoyed had the employer not violated the Act, and 2) to effectuate the purposes of the Act by encouraging employees to report violations of the Act without risk of losing their entire pay during the period necessary to obtain reinstatement.

The thrust of *Porter* and *Mitchell* is that equitable restitution is within the power of the federal courts and is properly ordered to restore ill-gotten gains and advance the statutory purpose.

In granting appellees the benefits they would have received but for the illegal statute, the district court was therefore simply "ordering the return of that which rightfully belong[ed] to [them]." *Porter, supra,* at 402.[9]

[9] *Cf. Social Security Board of Nierotko,* 327 U.S. 358 (1946). The Court stated that back pay awarded to an employee under the National Labor Relations Act for the period which he was wrongfully separated from his job is not a fine or a penalty imposed on the employer but the reinstatement and back pay are for the protection of the employees and the redress of their grievances to make them whole.

iv

The Possible Fiscal Consequences to the Social Security Administration Is Not Sufficiently Burdensome to Raise a Sovereign Immunity Defense to an Award of Such Relief

The factors that proved decisive in this Court's recent decision, *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974), are lacking in the instant case. This case, of course, does not involve state funds nor does it concern itself with the Eleventh Amendment. An award of the relief sought by appellees would not have the effect of placing a substantial financial burden on a state treasury and would not force the reallocation of scarce welfare funds that might result in depriving persons truly in need of present benefits in order to correct past wrongful practices.[10]

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

Respectfully submitted,

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[10] *Edelman, supra,* at 1357, n. 11.